Supreme Court of the United States

OCTOBER TERM, 1933.

No. ——.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE MONONGAHELA RAILWAY COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PITTSBURGH, CHARTIERS & YOUGHIOGHENY RAILROAD COMPANY, THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY, THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY, THE VIRGINIAN RAILWAY COMPANY, WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU, CARNEGIE COAL COMPANY, and Others, Appellants,

vs.

STATE OF OHIO and PUBLIC UTILITIES COMMISSION OF OHIO, and Others, Appellees,

And No. ——.

SAME APPELLANTS,

vs.

THE WHEELING & LAKE ERIE RAILWAY COMPANY, and Others, Appellees.

Appeals from the United States District Court for the Southern District of Ohio, Eastern Division.

BRIEF IN OPPOSITION TO MOTION TO ABATE SO MUCH OF THE ORDER OF THE DISTRICT COURT ENTERED IN ABOVE CAUSES ON THE 19TH DAY OF JANUARY, 1934, AS STAYED THE OPERATION AND ENFORCEMENT OF THE ORDER OF THE INTERSTATE COMMERCE COMMISSION OF MAY 2D, 1933, FOR SIXTY DAYS FROM THE FIRST MENTIONED DATE FOR THE PURPOSE OF PERFECTING AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

PRELIMINARY STATEMENT.

The orders of the statutory District Court here appealed from were made on the applications of appellees herein,

plaintiffs below, for a stay pending determination of the main appeal. (Motion, 98, 107) The applications were made after the opinion below had been filed but before the entry of the final decrees dismissing the petitions of plaintiffs below. (Motion, 83, 85, 87, 98, 107)

The applications came on to be heard at Dayton, Ohio, on January 13, 1934, before District Judges Benson W. Hough and Robert R. Nevin, the surviving members of the Court which heard the case on its merits, Circuit Judge Smith Hickenlooper having died on December 22, 1933. After some argument a question was raised as to the competency of the court as then constituted to pass upon the applications for a stay; and Judges Hough and Nevin thereupon continued the hearing to permit the reconstitution of the court. The applications again came on to be heard at Columbus, Ohio, on January 19, 1934, before Charles C. Simons, Circuit Judge, and Benson W. Hough and Robert R. Nevin, District Judges.

The applications were argued from 10:00 A. M. until 1:30 P. M. during which time five counsel were heard in opposition to the applications and three in support thereof. In the course of the argument, the evidence offered at the trial of the cause on the merits, as well as affidavits submitted in support of and in opposition to the motion, were elaborately discussed by both sides.

The applications were thereupon taken under advisement; and thereafter, upon instructions from the court, the orders, here appealed from, staying the order of the Interstate Commerce Commission were drafted in chambers by counsel representing one of the appellants.

In view of the lack of a record here and the pressure of time, it is necessary in this brief to make statements of fact about the proceedings below which are not substantiated by anything otherwise before this Court. We have therefore verified the statements of fact herein.

ARGUMENT.

I.

The Motion Should be Denied Because the Record on Which the District Court Granted the Stay is not Before This Court.

(A) THE DISTRICT COURT HAD POWER TO GRANT THE STAY ON A PROPER SHOWING.

The power of the District Court, as reconstituted, to grant the stay was conceded below, and is conclusively established by repeated decisions of this Court. *Hovey v. McDonald*, 109 U. S. 150, 161; *Cumberland Tel. Co. v. Pub. Serv. Comm.*, 260 U. S. 212, 219; *Virginian Ry. v. United States*, 272 U. S. 658, 668-672; *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 92; *Warehouse Co. v. United States*, 283 U. S. 501, 513.

(B) THE COURT BELOW UNDERSTOOD THE CONDITIONS UPON WHICH IT MIGHT RIGHTFULLY AWARD THE STAY COMPLAINED OF BY APPELLANTS.

On page 16 of appellants' motion it is said:

> "In the instant case there is neither showing nor any indication of doubt on part of the three judges or any one of them who composed the District Court".

The statement is erroneous. At the hearing in Columbus on the applications for the stay, counsel for the applicants conceded that the question of doubt as to the correctness of the court's decree dismissing the petitions of plaintiffs below bore on the right of plaintiffs below to a stay. A part of the argument of Clan Crawford for the applicants was as follows:

> "The Supreme Court has said that one of the elements which should be considered in cases of this sort in determining [whether] when the bill has been dismissed on the merits in the trial court a stay shall be granted is the question whether the case is one of

> doubt. Of course, we cannot tell your Honors very much about that. I assume from the fact that some eight months ago a preliminary injunction was issued by the Court that at least at that time it did not seem to be entirely clear that our contention here was wrong, and if there is any residual doubt remaining after your Honors' final determination here, that is, of course, one of the things that the Supreme Court has said is a proper consideration."

A part of the argument of Ernest S. Ballard for the applicants was as follows:

> "Mr. Payne said, and properly, that a showing of irreparable injury at this stage is not sufficient. Some other element is necessary to entitle us to prevail in our application for a stay, and the only other element that has been specifically stated by the Supreme Court is that there must be doubt with respect to the decision."

When therefore the court in its orders staying the order of the Interstate Commerce Commission recited that it was "fully advised in the premises" (Motion, 146), it meant that it was advised that the element of doubt as to the merits of the case was a prerequisite to the granting of the stay. The granting of the stay, therefore, implies a finding of doubt.

(C) IN PASSING ON THE APPLICATIONS FOR A STAY, THE DISTRICT COURT WAS REQUIRED TO AND DID CONSIDER THE EVIDENCE SUBMITTED AT THE TRIAL AS WELL AS THE AFFIDAVITS IN SUPPORT OF AND IN OPPOSITION TO THE APPLICATIONS.

The applications for a stay referred to and relied on the evidence submitted at the trial of the cause as well as affidavits submitted therewith. (Motion, 99.) The arguments of counsel in support of the applications and in opposition thereto included extensive discussion not only of the affidavits pro and con but also of the evidence submitted at the hearing on the merits. The decrees granting

the stay recite that the court had heard the evidence and argument of counsel and was fully advised in the premises. (Motion, 146.)

The decisions of this Court make it clear that it was the duty of the court below to consider all of the evidence in the proceeding in passing upon the applications for a stay. The first discussion of this question by this Court occurs in *Cumberland Tel. Co. v. Pub. Serv. Comm., supra,* where it was held that a statutory three-judge court in a proceeding under Section 266 of the Judicial Code (sec. 17, Act of June 18, 1910, c. 309, 36 Stat. 557, amended by Act of March 3, 1913, c. 160, 37 Stat. 1013, U. S. Code, Title 28, sec. 380) had power to grant a stay pending appeal after the denial of an injunction on its merits. With respect to the evidence proper to be considered by the trial court in such a matter this Court said (260 U. S. at p. 219):

> "But the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits and, therefore, *is familiar with the record.* Records in cases like this are often very voluminous. Such is the record in this case. Without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases may arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, *have read the record,* and can pass on the issue without additional labor." (Italics ours.)

This Court again clearly indicated in *Virginian Ry. v. United States, supra,* that in passing upon such an application, the District Court must have recourse to the entire record. Thus, this Court said in that case (272 U. S. at p. 674):

> "The District Court made no finding or statement bearing upon its exercise of discretion in suspending the operation of the Commission's order, except the

> recital in the decree that from all the evidence in the case it is 'of opinion * * * that irreparable damage will result to the complainant pending such appeal if this decree shall be reversed on appeal.' *We must therefore look elsewhere in the record for additional facts necessary to justify the suspension.*" (Italics ours.)

It is likewise clear from *Warehouse Co. v. United States, supra,* where this Court upheld the stay granted below after the injunction had been denied on its merits, that the court below properly gave consideration to the entire record before it (283 U. S. at p. 513).

(D) IN PASSING UPON THE PROPRIETY OF A STAY GRANTED BY THE COURT BELOW THIS COURT INVARIABLY EXAMINES THE RECORD BELOW TO ASCERTAIN WHETHER THERE WERE SUFFICIENT GROUNDS FOR THE STAY.

In three appeals from statutory District Courts constituted under the Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. Code, Title 28, sec. 47, this Court has considered and determined the validity of stays granted by the court below pending appeal after the denial of an injunction on its merits. In one of these, *Virginian Ry. v. United States, supra,* this Court held that there had not been sufficient grounds for the stay. In the other two, *Beaumont, S. L. & W. Ry. v. United States, supra,* and *Warehouse Co. v. United States, supra,* this Court held that there had been sufficient grounds for the stay. In all three cases this Court gave careful attention to the record below, so far as the same bore upon the question of stay, for the purpose of determining whether the discretion of the court below in granting the stay had been properly exercised. Thus, in the *Virginian Case* this Court said (272 U. S. at p. 674):

> "The suit was of a character deemed by Congress of such importance that it had made special provision for both adequate and speedy consideration. The strenuousness of the contest and the extensive record made clear the importance of the case not only

to the mines and carriers directly concerned but also to the consuming public in the western markets. It was clear that the appeal bond could not indemnify the Virginian mines or the Chesapeake & Ohio Railroad for the loss resulting from a stay, and also that the public might suffer losses for which there would be no remedy. The decree was not entered until nearly four months after the hearing—that period being doubtless required for adequate consideration of the voluminous record. No opinion, written or oral was delivered. In view of the importance of the litigation, we interpret the absence of an opinion as tantamount to a declaration that upon careful scrutiny of the record the questions presented for judicial determination appeared to be simple; or, at all events, that the case did not involve the determination of any question of law which was novel or as to which there was, or could be, reasonable doubt. The decree of the District Court was not unanimous; but this fact alone would not justify a stay. For aught that appears, the District Court may have divided on some questions of fact, or on the construction of a document. Under the circumstances appearing, the suspension of the order pending the appeal was unwarranted."

In the *Beaumont Case* the Court considered the nature of the proceeding before the Commission and the character of the questions involved therein as disclosed by the record below, saying (282 U. S. at p. 90):

> "The investigation was pending for more than five years before the first report was announced, December 10, 1928. No order was then made. The Commission allowed the carriers 60 days within which to agree on readjustments. In the report on rehearing, June 10, 1929, the Commission characterized the issues as important and the questions raised as relatively new and difficult. The order was made on the same day to take effect August 1, 1929. Before that date this suit was commenced, and the Commission postponed the taking effect of the order until December 1, 1929. In the meantime the case was tried and decided. It is clear that the Commission did not find that any emergency existed."

Similarly, in the *Warehouse Case* the Court discussed at length facts established by the record below as follows (283 U. S. at p. 513):

> "The court below was within the limits of its discretionary power in staying the Commission's order pending the appeal. The practice complained of was of long standing, entered into, so far as appears, in good faith, at a time when the discrimination, if it existed, was much less serious than at present, and before the present prohibitions against such discriminations. Its legality now is not free from doubt, as is indicated by the fact that the judges of the court below were not unanimous. The immediate enforcement of the order if the judgment below were not affirmed here would have resulted in a serious and unnecessary disturbance of a course of business affecting not alone the parties to this litigation, but the patrons of the various warehouses, which the court below found would be irreparable. These considerations, taken together, were sufficient to call for the exercise of its discretion. Cf. *Virginian Ry. Co. v. United States*, 272 U. S. 658, 672."

(E) THE EVIDENCE OFFERED AT THE TRIAL OF THE CAUSE IN THE DISTRICT COURT IS NOT BEFORE THIS COURT, AND THIS COURT THEREFORE IS UNABLE TO DETERMINE WHETHER THERE WERE SUFFICIENT GROUNDS FOR THE STAY.

These cases are here on appeal from the portions of the decrees of January 19th which grant a sixty-day stay for the purpose of perfecting appeals to this Court. The supporting papers on these appeals do not include all of the record below but only the portions thereof printed as attachments to the motion. These attachments are enumerated in the subject index of the motion and include none of the evidence below except the affidavits submitted in support of and in opposition to the applications for a stay.

In addition to these affidavits the court below had before it a certified copy of the entire record before the Commission, consisting of 3297 pages of oral testimony and more than 400 exhibits, which was received in evidence

in the District Court, by stipulation of counsel, as proof of the facts therein stated as well as proof of the evidence which was received before the Commission. That record is not here.

The evidence contained in that record was freely discussed and relied upon by counsel for both sides in the hearing on the applications for the stay. The decree granting the stay recites that the court had heard the evidence and the arguments of counsel, and the adequacy of the grounds for the court's action cannot be determined without an examination of that evidence.

II.

The Question of Granting a Stay Pending Determination of the Main Appeal Herein Will be Presented to This Court Within a Few Weeks on a Complete Record. The Present Motion is Therefore Premature.

Our applications below were for a stay pending *determination* of the appeal in this Court, upon the authority of *Cumberland Tel. Co. v. Pub. Serv. Comm., supra,* which we cited on argument. However the stay granted below runs only until the *perfecting* of the main appeal. We are now engaged in the preparation of that appeal, and at the time of perfecting it we shall present to this Court, or a Justice thereof, an application for a stay pending determination of that appeal. We expect to perfect that appeal within three or four weeks, depending upon the amount of time necessary to complete the preparation of the record.

At the time of making our application to this Court for a stay pending determination of our appeal we shall be prepared to file in this Court in connection with that appeal the entire record in the Court below prepared in due form in accordance with the rules. Determination of that application will necessarily involve the identical question presented by the present motion, namely, the propriety of the stay as granted below. In passing on that question so

presented, this Court will have before it in proper form the entire record on which the District Court acted in granting the stay.

As opposed to the orderly disposition of the matter suggested above, appellants, by their motion, seek to secure a summary reversal of the court below on a record which is manifestly incomplete. Appellants' motion is therefore premature.

CONCLUSION.

The power of the court below to grant the stay on a proper showing is not in question. The matter was properly presented to that court on the full record. The showing upon which the stay was granted is not before this Court. In passing upon the propriety of stays in similar proceedings, this Court has invariably examined the record below for the purpose of determining whether the showing was adequate. The record below is not here.

Within the shortest time consistent with the submission to this Court of an adequate record, the appellees here will, as appellants, present to this Court the question of granting a further stay on the full record.

The motion should be denied.

Respectfully submitted,

JOHN W. BRICKER,
Attorney General of Ohio.

DONALD C. POWER,
Attorney for the Public Utilities Commission of Ohio.

ATLEE POMERENE,
CLAN. CRAWFORD,
ANDREW P. MARTIN,
Attorneys for The Wheeling and Lake Erie Railway Company.

ERNEST S. BALLARD,
Attorney for Other Appellees.

VERIFICATION.

District of Columbia, ss:

Before me, Mary E. Neff, a Notary Public in and for the District of Columbia, personally appeared Clan Crawford, who, being first duly sworn according to law, says that he resides at 3005 Montgomery Road, Shaker Heights, Ohio; that he is one of the attorneys for The Wheeling and Lake Erie Railway Company, an appellee herein; that he is familiar with the proceedings in the District Court of the United States for the Southern District of Ohio in which the orders of said court from which appellants herein have appealed were made; that he has read the foregoing brief and that the statements therein relative to said proceedings are true; that he was in attendance upon the Court at the hearing of the applications for said orders at Columbus, Ohio, January 19, 1934; that the quotations from the arguments of counsel appearing in the foregoing brief were taken from the transcript of a stenographic report of said arguments furnished him by Florence K. Snively, Official Reporter of the court below; that he heard said arguments: that the quotations appearing in the foregoing brief are in substantial accord with his recollection; and that he believes them to be correct.

(s) CLAN CRAWFORD.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 8th day of February, 1934.

(s) MARY E. NEFF,
Notary Public.

(NOTARIAL SEAL)

My commission expires June 15, 1936.

AFFIDAVIT OF SERVICE.

District of Columbia, ss:

Before me, Mary E. Neff, a Notary Public in and for the District of Columbia, personally appeared Clan Crawford, who being first duly sworn according to law, says that he is one of the attorneys for the appellees herein, and that he has this day served the foregoing brief upon the attorneys for all of the appellants herein by mailing a copy thereof to each of them.

(s) CLAN CRAWFORD.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 8th day of February, 1934.

(s) MARY E. NEFF,
Notary Public.

(NOTARIAL SEAL)

My commission expires June 15, 1936.